

Advisory

LABOR AND EMPLOYMENT PRACTICE GROUP | MARCH 2009

celebrating 75 years
WIGGIN AND DANA
founded 1934

New Federal Subsidy of COBRA Premiums Under the American Recovery and Reinvestment Act of 2009

The American Recovery and Reinvestment Act of 2009 (the "Act"), passed by both Houses and signed into law by President Obama on February 17, 2009, provides for a federal subsidy for COBRA premiums paid by involuntarily terminated employees. This client advisory briefly summarizes the provisions of the Act pertaining to the subsidy and highlights the requirements of employers and plan administrators.

ENTITLEMENT TO SUBSIDIZED COBRA PREMIUMS FOR A LIMITED PERIOD

Under the Act, the federal government will subsidize 65% of COBRA premiums actually charged to "assisted eligible individuals" (AEI) for a maximum period of 9 months, beginning March 1, 2009. To qualify for the subsidy, an employee must have been involuntarily terminated for reasons other than gross misconduct during the period from September 1, 2008 through December 31, 2009. The subsidy does not apply to employees who voluntarily resign or who remain employed but lose medical coverage due to a reduction of work hours.

Those who are eligible for subsidized COBRA premiums include not just the affected employee, but also any 'qualified beneficiary' for COBRA purposes. Thus, even if the employee does not elect COBRA coverage, the spouse and dependent children of the terminated employee covered under the medical plan as of the employee's termination of employment will be eligible for the 65% subsidy if they elect to continue COBRA coverage.

The subsidy applies to coverage under both federal COBRA laws and state laws. It applies to medical, dental and vision coverage, but not to health flexible spending accounts.

INCOME LIMITATION ON TAX-FREE SUBSIDY

While high income individuals are eligible for the 65% subsidy, the amount of the subsidy will be fully taxable to those AEIs earning more than \$145,000 (\$290,000 for jointly filed returns); and those AEIs earning more than \$125,000 but less than \$145,000 (more than \$250,000 and less than \$290,000 for joint returns) will find that a portion of their subsidy is taxable. Although details are far from clear, it appears that the tax will be levied at the time that an AEI files his or her federal income tax return. Since the subsidy will be taxable in whole or part to high income individuals, the Secretary of the Treasury has been directed to provide 'a form and manner' by which such individuals may make a permanent election to decline the subsidy.

PROVIDING AND CLAIMING THE SUBSIDY

Under the Act, AEIs will be considered to have paid the full COBRA premium if they pay 35% of the required premium. In order to be eligible for the 65% subsidy, an employer (or, as outlined below, the other responsible entity) must first pay the remainder of an AEI COBRA premium and then becomes entitled to 'reimbursement' in the form of a tax

continued next page



credit against its payroll tax liability. In the event that such a tax credit is insufficient, the employer (or other responsible entity) may qualify for a direct reimbursement, paid in the same manner as a refund for overpayment of employment taxes. This may be a likely scenario for multiemployer group plans, which may not have sufficient tax liabilities to benefit from the tax credit.

Under the Act, in certain circumstances it is the plan or insurer itself, rather than the employer, which must provide the 65% subsidy and then is entitled to the payroll tax credit for the 65% subsidy. The Act states that 'the person to whom premiums are payable under COBRA continuation coverage' is entitled to reimbursement of the 65% subsidy (and presumably must be the one to provide the subsidy). It then goes on to define that 'person' as being:

- (i) the plan, in the case of a multi-employer plan (such as a Taft-Harley plan) that provides health insurance benefits;
- (ii) the employer maintaining the plan in the case of any other insured group health plan subject to COBRA provisions under ERISA, the Internal Revenue Code, or the Public Health Service Act;
- (iii) the employer maintaining the plan, in the case of partially or fully self-insured plan; and
- (iv) the insurer providing the coverage in the case of a fully insured plan not covered under
 - (i)–(iii) above (e.g., an insured plan not subject to federal COBRA continuation laws, but instead subject to state insurance continuation laws.)

DURATION OF THE SUBSIDY

The subsidy is available for coverage periods beginning March 1, 2009 and up to a maximum period of 9 months. However, the Act provides that an individual's eligibility for the subsidy will end upon being offered coverage under another employer's group plan (regardless of actual enrollment status) or qualifying for Medicare, if that is sooner than the expiration of the 9 month period. An individual must provide notice of such eligibility or qualification. Failure to provide notice renders the individual liable for 110% of the subsidy amount that was improperly paid to him or her. In addition, the subsidy period ends at the expiration of the maximum COBRA period, or when the AEI fails to pay the required 35% share of COBRA premiums.

NOTICE REQUIRED

Employers should begin now to review and revise the notices that are sent to terminated employees (and other qualified beneficiaries) regarding COBRA coverage to incorporate information about the availability of the federal subsidy, lower cost health plan options (if any are available), the obligation of a qualified beneficiary to notify the plan about having become eligible for coverage under another group health plan that would cut off the COBRA subsidy, and the penalty for failure to so notify the plan. The Act specifies that the notice *must* include:

- (1) the forms necessary for establishing eligibility for the COBRA subsidy;

- (2) the name, address and telephone number of the plan administrator and any other person ‘maintaining relevant information’ in connection with the subsidy;
- (3) for those who were involuntarily terminated from September 1, 2008 through February 16, 2009, a description of the special election period that they have, for 60 days after receiving notice, to elect COBRA coverage (such description should make it clear that the maximum COBRA period runs from the date of the termination of employment);
- (4) a description, prominently placed, of the qualified beneficiary’s right to a reduced COBRA premium and the conditions on such entitlement;
- (5) a description of the qualified beneficiary’s obligation to notify the plan providing COBRA coverage of eligibility for coverage under another group health plan, and the penalty for the failure to do so; and
- (6) a description of the option, if permitted by the employer, to enroll in less expensive or different health coverage.

The Act mandates that the notice in connection with the ‘special’ extended election period for those AEs terminated from September 1, 2008 through February 16, 2009 be provided by the administrator of the group health plan (or other entity) involved within 60 days from February 17, 2009 (i.e., by April 18, 2009). Such notice must be sent to individuals who previously declined COBRA coverage, allowing them another

opportunity to elect coverage and benefit from the subsidy, as well as individuals who elected but subsequently canceled COBRA coverage.

Although the Department of Labor is directed to issue model notices within 30 days from the date of enactment, given the tight timeframe within which notices must be distributed, prudence suggests that employers and plan administrators begin compiling distribution lists and start the process of notice revision so that they are prepared to give timely notice.

REPORTING WILL BE REQUIRED

The Act provides that the Treasury Department will require the ‘person entitled to reimbursement’ of the 65% subsidy (i.e., the employer, insurer or plan, as the case may be) to file certain reports related to the subsidy. The Act specifies that such persons will be required to file (i) an attestation that each employee receiving the subsidy was involuntarily terminated; (ii) a report of the payroll tax credit taken for each reporting period and the estimated payroll tax credits to be taken during the following reporting period; and (iii) a report containing the tax ID numbers of all individuals receiving coverage, indicating the portion of the subsidy to be treated as a payroll tax credit, and whether the subsidy is for coverage of one, two or more individuals.

ACTION REQUIRED NOW

Employers, insurers, plan administrators and third party administrators will need to work cooperatively and quickly to ensure that the new COBRA subsidy rules are promptly and correctly implemented. Members of Wiggin and Dana’s Employee Benefits practice group are available to assist should you have questions about the new rules or their implementation.



EMPLOYMENT DEPARTMENT CONTACTS

JOHN G. ZANDY, *Chair*
203.498.4330, jzandy@wiggin.com

KAREN L. CLUTE
203.498.4349, kclute@wiggin.com

SHERRY L. DOMINICK
203.498.4331, sdominick@wiggin.com

MARY A. GAMBARDELLA
203.363.7662, mgambardella@wiggin.com

PETER J. LEFEVER
203.498.4329, plefeber@wiggin.com

LAWRENCE PEIKES
203.363.7609, lpeikes@wiggin.com

JOAN ALLEN ROWE
203.498.4548, jrowe@wiggin.com

RACHEL B. ARNETT
203.498.4397, rarnedt@wiggin.com

JONATHAN M. BARDAVID
203.363.7638, jbardavid@wiggin.com

GREGORY A. BROWN
203.498.4401, gbrown@wiggin.com

MEGHAN D. BURNS
203.498.4382, mburns@wiggin.com

ERICK I. DIAZ
203.498.4462, ediaz@wiggin.com

BRYAN S. WATSON
203.498.4442, bwatson@wiggin.com

THIS PUBLICATION IS A SUMMARY OF LEGAL PRINCIPLES. NOTHING IN THIS ARTICLE CONSTITUTES LEGAL ADVICE, WHICH CAN ONLY BE OBTAINED AS A RESULT OF A PERSONAL CONSULTATION WITH AN ATTORNEY. THE INFORMATION PUBLISHED HERE IS BELIEVED ACCURATE AT THE TIME OF PUBLICATION, BUT IS SUBJECT TO CHANGE AND DOES NOT PURPORT TO BE A COMPLETE STATEMENT OF ALL RELEVANT ISSUES.